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September 23, 2003

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in MB Docket 02-230 (Digital Broadcast Copy Protection).

Dear Ms. Dortch:

On Monday, September 22, 2003, Lawrence R. Sidman and Sara W. Morris of Paul, Hastings, Janofsky & Walker LLP; and Tom Patton and Michael Epstein of Philips Electronics North America Corporation ("Philips"); met with the following staff of the Commission's Media Bureau, Office of Engineering and Technology and Office of Legislative Affairs to discuss issues in the above-referenced proceeding:

Media Bureau

Rick Chessen
Susan Mort
Deborah Klein
William Johnson
Thomas Horan
Steve Broecker
Alison Greenwald
Michael Lance
Mary Beth Murphy
Mike Perko
John Wong

Office of Engineering & Technology

Alan Stillwell

Office of Legislative Affairs

Lori Holy

Philips restated its position, articulated in both its Comments and Reply Comments filed in this proceeding, that the Commission lacks jurisdiction to implement the encryption technology mandate proposed by the Motion Picture Association of America ("MPAA") and the 5C companies ("the Proposed Regulation") absent a clear grant of statutory authority. Philips contrasted the regulation proposed here with both the DTV tuner

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mandate imposed under color of authority granted in the All Channel Receiver Act,¹ and the recently-enacted “Plug and Play” *Order* where statutory authority was conferred by Sections 624A and Section 629 of the Communications Act of 1934. Philips noted the further problem with exercising authority to implement the Proposed Regulation posed by Section 1201(c)(3) of the Digital Millennium Copyright Act,² which established a congressional policy against imposing specific digital content protection technology obligations on manufacturers of consumer electronics and information technology equipment. Finally, with regard to a jurisdictional claim resting principally, if not exclusively, on ancillary authority, Philips pointed out that the foundation of any such claim, weak though it may be, was fatally undermined by the broad scope of the Proposed Regulation, which extends beyond its purpose and rationale and, by virtue of the licensing terms in the 5C and 4C licenses, beyond digital broadcast content altogether.

Philips also reiterated its view, contained in its Comments and Reply Comments, that the state of technology today makes adoption and imposition of a technology mandate, especially one as ineffective for its stated purpose and burdensome to consumers as the Proposed Regulation, premature. Philips noted that the Commission made a similar decision *not to regulate* in the case of cable open access.

Philips pointed out two overarching fatal flaws with the Proposed Regulation. The first is that it is not limited in scope to preventing the unauthorized redistribution of high definition or other high-value digital broadcast content to the public over the Internet. That has been the stated rationale of the major broadcast networks and their studio owners from the outset of the debate, and Viacom and Disney both threatened in this proceeding to withdraw their HDTV (not SDTV) offerings if the Proposed Regulation were not adopted. The theory, around which a consensus exists, is that HDTV and other high value content will be a driver of the digital television transition and without adequate protection against its unauthorized redistribution to the public over the Internet, this HDTV and other high value programming would necessarily migrate from free, over-the-air television to pay services such as cable and DBS. The Proposed Regulation, however, addresses all digital broadcast content, not just HDTV and high-value content, and comprehends all unauthorized redistribution, not just to the public at large over the Internet, but point-to-point transmissions over the Internet from one’s home to one’s office or from a parent to a child. Moreover, because of the manner in which the Proposed Regulation incorporates the licensing terms of authorized technologies, which, in this case, according to the MPAA’s December 6, 2002, Comments, would include DTCP (or “5C”) and CPRM (or “4C”), its scope even would include non-broadcast content such as audio and cable.

¹ This reference does not concede FCC jurisdiction in that instance, the *Order* currently being under appeal to the United States Court of Appeals for the D.C. Circuit.

² Pub. L. No. 105-304, 112 Stat. 2860 (October 28, 1998) (codified at 17 U.S.C. § 1201(c)(3)).

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Second, the Proposed Regulation is a unique hybrid of a government technology mandate, with the full force and effect of law, coupled with a delegation *to private parties with enormous financial stakes in the outcome* of the all-critical right to designate the technology and control the terms of its use. Specifically, as described more fully in Philips' Comments and Reply Comments, the major studios and the 5C companies would effectively determine the "authorized technologies" under the Table A criteria contained in the appendix to the Proposed Regulation. Again, MPAA, in its Comments, already has anointed DTCP and CPRM. Moreover, the private licenses for those technologies, with absolutely no safeguards to prevent anticompetitive practices or decisions inhibiting innovation, would dictate the compliance and robustness rules which all manufacturers would be obliged to follow by virtue of the government mandate. Such a hybrid involves the use of government power to enforce self-serving decisions of private parties having the potential to reconfigure the competitive landscape of both the digital content protection and consumer electronics marketplaces. Either there should be no government mandate and no government regulation, letting the marketplace decide these issues, or if there is a government mandate, the government must be responsible for ensuring that the process for selecting authorized technologies is fair, open, transparent, based upon objective technical criteria against which all applicant technologies will be judged on an equal footing and that the terms for using any such technologies so authorized will contain fundamental safeguards essential to vindicating the public interest in a competitive marketplace where innovation can flourish. The hybrid Proposed Regulation raises fundamental questions of unlawful delegation of government authority to private parties.

Accordingly, in the meeting, Philips proposed two alternative regulatory structures or concepts for the Commission's consideration, assuming *arguendo*, that the Commission concludes that it has jurisdiction to regulate at all in this area.

The first, a template for which is attached as Appendix A hereto, follows the approach embodied in S. 1621, the "Consumers, Schools and Libraries Digital Management Rights Awareness Act of 2003," introduced by Senator Sam Brownback on September 16, 2003. It calls for the Commission to establish a broad regulatory objective – the prevention of the unauthorized redistribution of high definition or other high value content to the public over the Internet. After the Commission establishes an architecture (or architectures) and specifies the digital products that would be covered, manufacturers could certify that their method, whether it be encryption, watermarking, digital rights management tools or other methods, achieves that objective. The Commission would have the power to resolve complaints and impose sanctions if the certification proved false. This functional regulation and self-certification approach would take the Commission out of the business of picking technology winners and losers and build in incentives to promote competition and innovation in both the digital content protection marketplace and the consumer electronics and IT equipment marketplaces. It also is consistent with the Broadcast Flag provisions of the September 2002 House Energy and

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Commerce Committee Staff Draft of comprehensive DTV legislation, which expressly contemplated self-certification.

The second approach, the template for which is attached as Appendix B hereto, is intended to be incorporated into any broader digital content protection regulation that the Commission might adopt that does not rely on functional regulation and self-certification. It addresses two critical aspects of any such regulation: the process by which technologies are authorized and core safeguards to be a part of any license of such authorized technologies that in essence become mandated upon all manufacturers building compliant products. The provisions dealing with selection of authorized technologies, for example, would supplant Attachment C to the MPAA's December 6, 2002 Comments, "Joint Proposal of MPAA and 5C Companies for Table A Criteria." The provisions embodying safeguards to prevent anticompetitive licensing terms would apply to any license under any authorized technology. Even were the Commission to conclude that the Proposed Regulation's Table A structure were acceptable (which for all the reasons discussed above and in its Comments and Reply Comments Philips does not believe is the case), the Commission, in the exercise of its oversight authority, should require any license for any authorized technology to incorporate these safeguards.

The remainder of the meeting addressed specific problematic provisions of the Proposed Regulation, focusing on: (1) scope (specifically, its preclusion of wholly lawful transmissions of digital broadcast content over the Internet); (2) effectiveness (specifically, the exemption contained in Requirement X.3, enshrining the analog hole in the Proposed Regulation and thereby foreclosing an effective technological solution to the purported problem (*i.e.*, the "Napsterization" of video)); (3) the failure to address the impact of software demodulators; and (4) definitional questions associated with "Downstream Products."

In addition, Philips reiterated, with specificity, its serious concerns regarding Requirements X.3 and X.4 of the Proposed Regulation, which effectively permit the private licensing terms associated with an authorized technology to trump virtually everything that would be regulated by the Commission under the Proposed Regulation. As a real-world example of this concern, Philips pointed out a sweeping change recently made, unilaterally by the 4C licensors, to compliance rules accompanying the CPRM technology. That change requires consumer electronics (but not IT) devices licensed to make recordings using CPRM to search all incoming analog content (including DVD and cable content) for CGMS-A, a marking technology in which the 4C companies have a financial stake. As discussed at length in Attachment C hereto, this change confirms Philips' worst fears about the potential threat – to the public interest, competition and innovation – posed by a government mandate of privately-controlled digital broadcast content protection technologies.

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In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1206, one copy of this letter and its attachments is being filed electronically. Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,



Lawrence R. Sidman

Attachments:

- Appendix A, "Functional Regulation and Self-Certification"
- Appendix B, "Authorization Process and Licensing Safeguards"
- Appendix C, "Unilateral, Sweeping Changes To The Compliance Rules Associated With CPRM Technology Highlight the Anticompetitive Dangers Posed By The Encryption Technology Mandate Proposed By The MPAA And 5C."

cc (with Appendices):

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Bryan Tramont
Paul Gallant
Stacy Robinson
Catherine Bohigian
Matt Brill
Jordan Goldstein
Daniel Gonzalez
Anthony Dale
Johanna Mikes
John Rogovin
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Michael Lance
Mary Beth Murphy
Mike Perko
John Wong
Alan Stillwell
Patrick Donavan
Jonathan Levy
Jane Mago
Maureen McLaughlin
Amy Nathan
Paul Jackson
Lori Holy

APPENDIX A

FUNCTIONAL REGULATION AND SELF-CERTIFICATION

Section Y.1. Establishment of Schedule.

The Commission shall establish a schedule, pursuant to a Further Notice of Proposed Rulemaking, whereby compliance with the obligations set forth in this section is required. In establishing such schedule, the Commission shall consider the current and foreseeable state of technology, including but not limited to, broadband deployment and bandwidth limitations, associated with uploading and downloading high definition and other high value digital broadcast television content over the Internet, the manufacturing cycle of digital product manufacturers, the adverse effect on the DTV transition if content producers lack the assurance provided by these capabilities, and the impact upon consumers, including limitations on expected functionality, fair use and costs.

Section Y.2. Obligations of Digital Product Manufacturers.

Upon a determination by the Commission of an appropriate architecture(s) for the protection of high definition or other high value digital broadcast television content, the Commission shall specify those digital products—including consumer electronics and information technology devices—required to employ a technological measure, based on encryption, watermarking, digital rights management or other means, to prevent the unauthorized redistribution of high definition or other high value digital broadcast television content to the public over the Internet or prevent the unauthorized display or playback of such content after it has been transmitted over the Internet. Such technological measures shall not discriminate between consumer electronics and information technology devices.

Section Y.3. Cooperation of Broadcasters and Content Producers and Suppliers.

Broadcasters and content producers and suppliers shall cooperate with manufacturers to ensure the availability of data, be it the Broadcast Flag or data embedded in the high definition or other high value digital broadcast television content, such as watermarks, needed for digital products to perform the obligations in Section Y.2.

Section Y.4. Self-Certification.

A manufacturer of a digital product covered by this Section shall certify that such product is manufactured so as to prevent the unauthorized redistribution of high definition or other high value digital television broadcast content to the public over the Internet or otherwise prevent the unauthorized use of such content once it has been transmitted over the Internet.

Section Y.4(a). Permitted Internet Redistribution or Use.

The self-certification in this Section Y.4. shall be valid if the technological measure permits the point-to-point transmission of high definition or other high value digital broadcast content over the Internet from one's home to one's office, to a remote location such as a second home, motor vehicle or boat, or to a family member.

Section Y.5. Complaints.

A broadcaster or content producer or supplier may file a complaint with the Commission if it believes, in good faith, that the certification made by a manufacturer under Section 4 is false. The Commission shall resolve a complaint filed.

APPENDIX B

AUTHORIZATION PROCESS AND LICENSING SAFEGUARDS

Section Z. Digital Content Protection Technology To Protect High Definition and Other High Value Digital Broadcast Television.

Section Z.1. Objective.

The objective for selection of digital content protection technologies under this Section shall be to prevent the unauthorized redistribution of high definition or other high value digital broadcast television content over the Internet to the public.

Section Z.2. Process for Selection of Technologies.

The Commission, in consultation with the National Institute of Standards and Technology within the Department of Commerce, and such other independent experts, including the National Academy of Sciences, as the Commission may deem appropriate, may, by following the process set forth in this Section Z.2, authorize certain digital content protection technologies for the purpose described in Section Z.1.

Section Z.2.a. Nomination.

A manufacturer of a digital product, the developer of a digital content protection technology, a broadcaster or a content producer or supplier may nominate a digital content protection technology for the Commission's consideration.

Section Z.2.b. Criteria for Selection.

The Commission shall employ objective criteria, including objective technical criteria, to be established within 180 days of the effective date of this rule, for authorizing digital content protection technologies. Such objective criteria shall, at a minimum:

- (i) Establish a baseline for effectiveness in preventing the unauthorized redistribution of high definition or other high value digital broadcast television content to the public over the Internet;
- (ii) Establish technical standards to prohibit such technology from defeating fair use expectations of consumers;

(iii) Require that such technology be designed such that defeating or avoiding the technology would require either: 1) use of a device that is beyond the ordinary capability of an ordinary user to construct; or 2) acquisition of the keys to an encryption system that is at least 56 bits in length. When protected content is digitally output, transmitted, or recorded over a digital interface, the technology should also ensure that the content continues to contain information marking it as protected digital broadcast television content;

(iv) Require that such technology confirm that devices receiving marked content comply with the digital output, recording and compliance rules. The technology should accomplish such authentication in a way that prevents unauthorized snooping on the interface. The technology and its associated license may not, however, allow content providers to mark content in a manner that restricts its use in ways beyond those reasonably necessary to prevent unauthorized redistribution to the public over the Internet;

(v) Ensure that output and recording technologies authorized for use with such technology allow use of digital outputs and recordable media protected by other approved technologies without requiring additional approval; and

(vi) Provide for no output technology to be approved until a certain minimum number of competing output technologies also are approved. Similarly, no recording technology should be approved until a minimum number of competing recording technologies have been approved.

(vii) Ensure that the applicable license (including any associated compliance and robustness rules) complies with the provisions of Section Z.3.

Section Z.2.c. Opportunity for Public Comment.

Prior to authorizing any digital content protection technology under this Section, the Commission shall provide the public with sixty days to comment thereon and for proponents with 30 days in which to reply. The Commission shall publish sufficient technical details about the technology and the Commission's proposed decision to authorize it as to apprise the public of how it fulfills the objective criteria.

Section Z.2.d. Authority Not to Authorize Any Content Protection Technology.

The Commission may determine that no digital content protection technology shall be authorized or required if it finds that it is not in the public interest to do so taking into consideration the need for such a technology to advance the digital television transition, the effectiveness of nominated technologies, and the impact upon content providers, manufactures and consumers.

Section Z.3. Licensing Terms for Authorized Technologies.

Any digital content protection technology authorized by the Commission under this Section shall be licensed on fair, reasonable and nondiscriminatory terms to manufacturers of devices seeking to use such technology. At a minimum, such terms (including any associated rules) shall:

- (a) Not require licensees to agree not to assert any intellectual property they may have in the technology as a condition for obtaining a license, but such terms may require licensee patents to be licensed on reasonable and nondiscriminatory terms;
- (b) Apply equally and without discrimination to both consumer electronics and IT devices;
- (c) Require change management procedures applicable to the technical specifications, compliance and robustness rules, providing for adequate notice of contemplated changes, opportunity for licensees and content providers to comment upon any such changes before they are implemented and appeal of such changes to the Commission on grounds that they create competitive disadvantage or otherwise increase materially the cost or complexity of manufacturing.
- (d) Not obligate devices that receive or play back digital broadcast television content using such technology to conform to compliance and robustness rules that exceed or differ from those applicable to devices directly subject to the compliance and robustness rules (if any) set by the Commission;
- (e) Impose obligations only with respect to high definition and other high value digital broadcast television content;
- (f) Not impose obligations or conditions that extend beyond the scope of the intellectual property that is being licensed;
- (g) Not impose obligations that expand the use of the authorized technology beyond that required by this Section, *e.g.*, application to analog reconversion.

APPENDIX C

UNILATERAL, SWEEPING CHANGES TO THE COMPLIANCE RULES ASSOCIATED WITH CPRM TECHNOLOGY HIGHLIGHT THE ANTICOMPETITIVE DANGERS POSED BY THE ENCRYPTION TECHNOLOGY MANDATE PROPOSED BY THE MPAA AND 5C

In its Comments and Reply Comments in this proceeding, Philips made clear that the encryption technology mandate proposed by the MPAA and the 5C companies (the “Proposed Regulation”) would delegate power over core public policy decisions regarding the ability of consumers to use DTV content to a small number of private parties with an enormous financial stake in the outcome.¹ This power would derive from the group’s control of over-reaching “compliance rules,” which dictate the manner in which all devices licensed to use the technology are required to handle DTV and other digital video content. Philips demonstrated that this arrangement would threaten the public’s interest in the flexible use of content, injure competition in both consumer devices and content protection technologies, and preclude examination of unreasonable provisions by those charged with protecting the public interest.

Recent sweeping changes in the compliance rules applicable to one of the digital content protection technologies anointed by the major studios and the 5C companies – CPRM – provide a stark illustration of the concerns identified by Philips. These changes confirm that the Proposed Regulation would grant the providers of an “authorized technology:”

- The right and ability to change the relevant rules unilaterally, without advance notice, public scrutiny, FCC scrutiny, or even licensee input or consultation;
- The ability to preempt public discussion of basic public policy issues (in this case, the analog hole), despite the ongoing consideration of the issue by the FCC and a multi-industry working group;
- The ability to distort competition in technology markets, by tying their selected technology to inferior or ineffective technologies at the expense of superior technologies (such as watermarking), in which others own relevant IP;
- The ability to distort competition in product markets by adopting changes in the rules governing their selected technology that further their own competitive interests;
- The ability to discriminate without justification between consumer electronics products and computer-related products; and
- The ability to attempt to extend the power of their license agreements into functions of a device that do not in any way make use of the licensed technology, in a manner contrary to basic principles of IP licensing.

¹ See, e.g., Philips Reply Comments at 28.

Background of The Changes To The CPRM Compliance Rules

On July 29, 2003, the 4C Entity, LLC, licensors of the CPRM technology, announced the adoption of a new requirement for all consumer electronics video recording devices licensed by 4C to inspect all content received over inputs that are not protected by a “Commercially Adopted Access Control Method,” including, among other inputs, analog inputs. The new rules require the CE video recorders to inspect for and respond to both the Macrovision AGC technology and CGMS-A. No similar obligation is imposed on CPRM licensed computers or computer-related products.

The decision to adopt CGMS-A and to limit the obligation to CE devices appears to be have been driven by specific commercial interests of the 4C member companies.

If a CE video recorder licensed to use CPRM receives content carrying CGMS-A coding that indicates that no copies are to be made, the device is not permitted to record the content, regardless of whether it uses CPRM to make the copy. If the content is identified as “copy-one-generation,” the device may only record using CPRM or another protection technology approved by the 4C Entity.

Although the reasons for the change are not explained, it is apparent that they relate to the issue of the so-called “analog hole,” the transmission of digital content over analog interfaces and the reconversion of that content back into digital form, which is a subject being discussed before the FCC, Congress and in an ongoing, multi-industry discussion group called the Analog Redistribution Discussion Group (“ARDG”). The ARDG is considering various approaches to the analog hole, including watermarking and CGMS-A.

Content transmitted over analog outputs by certain licensed or otherwise regulated devices (e.g., DVD players licensed by DVDCCA) are obligated to encode content with CGMS-A and to apply Macrovision AGC. No similar rule has yet been proposed for broadcast content and broadcast content would not be marked with CGMS-A under the Proposed Regulation. Nevertheless, a device licensed by 4C for broadcast content would be required to inspect for CGMS-A on all analog inputs and to comply with respect to non-broadcast content. Thus, use of CPRM as an “approved technology” under the Proposed Regulation would impose these obligations, by virtue of the compliance rules of the CPRM license *which have nothing to do with over-the-air digital broadcast content*, on all consumer electronics recording devices.

Moreover, CGMS-A is an ineffective means of addressing the analog hole. It is carried in lines 20 and 21 of the vertical blanking interval, which is not needed to reproduce the picture. Data carried in lines 20 and 21 are easily stripped, and often are stripped by computers. Further, it is a trivial matter to change the CGMS-A encoding by changing the bits in lines 20 and 21. And, needless to say, any rule that applies only to consumer electronics recorders and not to computers does nothing to address the primary threat of the analog hole.

The 4C Action Highlights the Risk To Public Policy of the Proposed Regulation

The action by the 4C Entity preempts an open, multi-industry discussion group considering the analog hole. The motion picture industry, consumer electronics industry, IT industry and representatives of the public have been engaged, since February, in a thorough

review of the technologies available to address the issue of digital content that is converted to analog form and reconverted to digital form. On July 30, 2003, the ARDG issued a Call for Information (the CFI), asking a comprehensive set of questions about various technologies. Preliminary responses to that CFI were submitted on September 22, 2003, and full responses to a comprehensive matrix of questions are due on October 8, 2003. CGMS-A is one of the technologies that will be examined for this purpose; watermarking is another. Other technologies are expected. The goal of the ARDG is to issue a report that can be used to inform public policy debate.

The analog hole issue is properly an issue for open public policy debate and resolution, not unilateral action. First, unless meaningful safeguards are put in place, a marking technology may be misused to restrict consumer fair use rights. For example, analog broadcast content could be encoded “copy never” by an overzealous content owner. Second, adoption of a technology that is easily circumvented will not resolve the issue, but will only extend the debate as additional protection is sought. Third, fundamental fairness requires that any solution be equally applicable to consumer electronics devices and IT-based applications. CGMS-A as imposed by the CPRM compliance rules fails each of these tests.

The 4C Action Highlights the Risk to Competition of the MPAA/5C Proposal

Philips has emphasized the risk to competition of allowing those who control authorized technologies to change the rules governing the use of those technologies. The recent 4C action underscores the extent of that threat.

First, there can be no doubting the fundamental nature of the change in compliance rules adopted unilaterally by the 4C. The group has adopted substantial additional obligations and restrictions on the functioning of CE devices. The obligation that has been imposed applies to all content received over analog interfaces.

Second, the obligation is beyond the scope of any rights of the 4C in the intellectual property it is licensing. The 4C’s rights extend to the use of the CPRM technology. However, CPRM is not necessary to receive content over an analog interface or to record it. In essence, the 4C are leveraging the fact that device manufacturers want to use CPRM to record certain types of content to obligate them to use the licensed technology for other content. This is an inappropriate extension of IP rights in CPRM.

Third, the rule clearly distorts competition. Computers and IT-based recording devices are not required to respond to either Macrovision AGC or CGMS-A. Thus, the rules unfairly and unequally burden CE devices. Moreover, there is an ongoing, vigorous competition among CGMS-A, watermarking and other technologies in connection with the best approach to the analog hole. By adopting CGMS-A, the 4C has itself picked the winner of that competition.

Fourth, in light of this change, there can be no doubt about the risk to competition from future changes. As Philips argued in earlier comments, the power to change compliance rules allows the proprietor of a selected technology the ability to shape rules to benefit its competitive goals.